



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**Region IX
75 Hawthorne Street
San Francisco, CA 94105**

November 16, 2021

VIA EMAIL ONLY

Daniel Yazzie
Environmental Program Manager
Superfund Program
Navajo Nation Environmental Protection Agency
Post Office Box Z946
Window Rock, Arizona 86515

Re: Response to Navajo Nation Superfund Program Letter dated November 5, 2021
Draft Tronox Funding Allocation Strategy

Dear Mr. Yazzie:

The United States Environmental Protection Agency, Region 9 (USEPA) appreciates the questions and comments provided in your November 5, 2021 letter on behalf of Navajo Nation Environmental Protection Agency (NNEPA) regarding on the draft Tronox Funding Allocation Strategy. The purpose of this letter is to provide, in Attachment A, responses to the questions and comments in that letter. We hope the information provided in this letter will assist NNEPA in its ongoing review of the draft Tronox Funding Allocation Strategy. As discussed during our November 9, 2021 meeting, USEPA has requested any additional input from Navajo Nation by **November 30, 2021**. The materials that USEPA shared in our meetings on October 13, 2021 and November 9, 2021 are provided as Attachment B (PowerPoint Presentation) and Attachment C (Memo providing narrative description of Draft Tronox Funding Allocation Strategy).

We look forward to a further discussion of this matter at our planned consultation with the Navajo Nation Office of the President and Vice President on November 18, 2021. Please feel free to contact me at Duncan.will@epa.gov or (415) 972-3412. For legal questions, please contact Laurie Williams at williams.laurie@epa.gov or (415) 972-3867.

Sincerely,

WILL DUNCAN Digitally signed by WILL DUNCAN
Date: 2021.11.16 17:01:57 -08'00'

Will Duncan, Assistant Director
Superfund and Emergency Management Division

cc: Valinda Shirley, Executive Director, NNEPA

Attachments:

- A. Responses to Questions and Comments in NNEPA November 5th Letter
- B. October 13, 2021 PowerPoint Presentation
- C. USEPA Summary of Tronox Allocation Methodology dated November 5, 2021
- D. NNEPA Letter dated November 5, 2021

Attachment A

Responses to Questions and Comments in NNEPA November 5th, 2021 Letter

NNEPA Question/Comment No. 1 (Prioritization):

PowerPoint Slide 6: January 2021 Prioritization List. How was the Prioritization List developed? Please indicate if the Navajo Nation was involved, as well as the extent of that involvement.

USEPA Response No. 1 (Prioritization):

Allocation is Independent from Prioritization: At the outset, it may be helpful to address the relationship between prioritization and allocation and why these parameters are addressed separately. Prioritization is a determination of which sites present the greatest risks and should be addressed before other sites, given that USEPA does not have the ability to address all sites simultaneously. Allocation refers to how the Tronox Settlement Funds will be distributed among the 54 Tronox NAUMs. Prioritization does not affect the amount of Tronox funding that will be provided for a particular mine site's cleanup. Rather, it only influences the order in which USEPA plans to address the sites. Given that the Tronox NAUM Site cleanups will be separately administered for the 34 sites on the Navajo Nation in Region 9 and the 20 sites off the Navajo Nation in Region 6, NNEPA can continue working with USEPA to determine the order in which Region 9 sites will be addressed. At this time, USEPA understands that NNEPA supports addressing the cross-regional Sections 32/33 mine site area as the highest priority.

Pre-Tronox Prioritization Efforts: USEPA Region 9 began efforts to prioritize work on the Navajo Abandoned Uranium Mines soon after the development of the 2007 Atlas, which provided initial information on the location of and radiation levels at the more than 500 uranium mine sites on the Navajo Nation. Prior to obtaining the Tronox Settlement funds, Region 9 worked with NNEPA, in a series of quarterly meetings, to identify key factors and developed a list of 46 mine sites that, based on their proximity to inhabited structures and water, as well as levels of radiation, were labeled "priority mines." (*see Roux "Initial White Paper on Cleanup Options, dated September 29, 2015 at pdf page 26 of 195*). Three of the 46 priority mine sites were located in Cove Chapter and are among the 54 Tronox NAUM Mines Sites.

Tronox Mine Sites Prioritization: Development of a prioritization list for the 54 Tronox NAUM Sites was an effort by USEPA Regions 6 and 9, in collaboration with NNEPA and New Mexico, over several years. Criteria for development of this list were discussed during Tronox Stakeholder Workgroup Meetings in 2016 through 2018. This led to a list of factors to be considered in prioritization that was finalized around the time of the November 2018 Tronox Stakeholder's meeting. USEPA used these factors to create the prioritization list that was submitted to NNEPA and New Mexico as well as the USEPA Inspector General on December 29, 2020.

NNEPA Question/Comment No. 2 (Commitment to Consider Regulatory Stakeholder Input):

PowerPoint Slide 6: EPA to complete Final Resource Allocation. The Navajo Nation recognizes USEPA is to determine the Allocation Strategy in accordance with the terms of the Settlement. The Navajo Nation respectfully requests that the USEPA seriously considers the Nation's comments and questions before submitting the Proposed Allocation Strategy.

USEPA Response No. 2 (Commitment to Consider Regulatory Stakeholder Input):

EPA welcomes the comments and questions of the Navajo Nation and will consider all input received from Navajo Nation and the State of New Mexico. Regions 6 and 9 are required to submit their Tronox Funding Allocation Strategy to the USEPA Office of Inspector General by December 31, 2021.

NNEPA Question/Comment No. 3 (If Negotiations with PRPs Fail):

PowerPoint Slide 7: Other Financially Viable PRPs Exist. The Navajo Nation is concerned that certain identified viable PRPs will not yield successful negotiations based on past actions and comments. For example, the Department of Energy has previously stated it does not intend to remediate former DRUM sites. How might this reluctance affect negotiations, and what is USEPA's plan to assure the Navajo Nation that all mines under the Settlement will be remediated?

USEPA Response No. 3 (If Negotiations with PRPs Fail):

DOE's Defense Related Uranium Mine (DRUM) Program: USEPA understands that DRUM program representatives have told NNEPA that they will only assess mine sites and do not currently anticipate performing cleanup under the DRUM Program. This particular DOE program is limited to filling data gaps in the DRUM Report. The existence of this program does not constrain USEPA's enforcement efforts or the obligation of DOE to perform all required cleanup work at mine sites where the agency has CERCLA liability, including at the Tronox NAUM Sites.¹

Options if Negotiations Under CERCLA Fail: USEPA has considered the possibility that negotiations with the PRPs will not be successful. If negotiations are not successful, USEPA will pursue other avenues of enforcement. Specifically, Regions 6 and 9 will have the option of issuing unilateral administrative orders to the PRPs and, in the case of private parties (23 of the sites on the Navajo Nation), of seeking enforcement of those orders in court. USEPA has begun this process by issuing General Notice Letters to both private and federal PRPs, publicly stating

¹ See DOE DRUM Fact Sheet , available at: <https://www.energy.gov/lm/articles/defense-related-uranium-mines-program-fact-sheet>

that USEPA has determined that these parties have potential liability under CERCLA for the Tronox NAUMs. For sites where the only PRPs are federal agencies (Department of Energy (DOE) and Department of Interior (DOI), which includes 11 of the Tronox sites on the Navajo Nation), USEPA will need to work with the US Department of Justice to enforce the obligation of these parties under CERCLA to perform or fund the required work.

Settlement and Litigation at non-Tronox Navajo Uranium Mine Sites: Fortunately, settlements to date regarding a number of non-Tronox uranium mine sites on the Navajo Nation demonstrate that negotiations are likely to be successful. In addition, at least one final federal court decision has affirmed that the federal agency PRPs had CERCLA liability in very similar circumstances (El Paso Natural Gas v. U.S., (D. Ariz. 2019)).² In recent settlements, including the 2017 Cyprus Amax Consent Decree and the 2021 EnPro Consent Decree, the federal agency PRPs settled their liability for contribution at more than 100 of the non-Tronox Navajo Abandoned Uranium Mine sites. The EnPro settlement incorporated a 35% cost share for the federal government, consistent with the 2019 court decision in the El Paso Natural Gas case. Further, in 2015 and 2016, the United States entered into settlements with the Navajo Nation (the Phase 1 and Phase 2 Trustee Settlements) in which DOE and DOI agreed to fund required response work for more than 30 uranium mine sites on the Navajo Nation without financially viable private PRPs by funding the activities of a Trustee, who has hired contractors to perform the work.

NNEPA Question/Comment No. 4 (Intramural and Extramural Cost Estimates):

PowerPoint Slide 10: Intramural and Extramural Costs: How are intramural and extramural costs defined?

USEPA Response No. 4 (Intramural and Extramural Cost Estimates):

In order to ensure the successful clean-up of all Tronox NAUM Sites, USEPA plans to retain, consistent with the agency's special account guidance, the funds USEPA expects will be needed to ensure that this work is properly performed. These costs include the "intramural" costs of USEPA employee hours and travel. They also include the "extramural" amounts USEPA anticipates will be needed to fund cooperative agreements with Navajo Nation and New Mexico as well as response action construction and oversight contracts. USEPA has estimated these costs for both intramural and extramural costs based on prior experiences at other sites and our experience to date with the Tronox and other Navajo abandoned uranium mine sites.

² See <https://casetext.com/case/el-paso-natural-gas-co-v-united-states-9>

NNEPA Question/Comment No. 5 (Response Options used for Cost Estimates):

PowerPoint Slide 19: Options used for Estimates Why was the Off-Navajo Nation option selected for estimates? Is the Off-Navajo Nation option different than the regional repositories option selected for R6/New Mexico estimates?

USEPA Response No. 5 (Response Options used for Cost Estimates):

As noted above, USEPA has determined that it is unrealistic to make final response action decisions on all of the sites simultaneously. In addition, USEPA has determined that a funding allocation strategy is needed to expedite the enforcement needed to obtain additional funding for cleanup. As a result, USEPA needs to perform a Tronox Funding Allocation based on currently available information and estimates of costs for each site prior to a final selection of the remedies for the 54 Tronox NAUM Sites. Without such an allocation, it will not be possible to both begin negotiations with PRPs to perform work at the first sites to be addressed and also appropriately reserve funding for the last set of sites to be addressed.

Navajo Nation Tronox NAUM Sites: USEPA is using the off-Navajo Nation licensed repository option for the Tronox capital cost estimates for the 34 Sites on the Navajo Nation. This is because, while no final response action selection decisions have been made at this time, this disposal option remains under consideration, as do other less expensive options. The benefit of using the off-Navajo Nation option is that it preserves appropriate funding in the event that off-Navajo Nation disposal is ultimately selected.

Region 6 Tronox NAUM Sites: For the Region 6 Tronox NAUM Sites off the Navajo Nation in New Mexico, the off-site licensed repositories have been studied and are fully analyzed in the Alternative Analysis Memos. For those sites, this option is several times the cost of a combined site remedy (regional repository), which has been found to be implementable, protective, and cost-effective. As a result, USEPA has decided to use this combined action approach as the basis for cost estimates for those sites. Region 6 has discussed this option with the State of New Mexico regulatory agencies, and, while this option has not been selected, it is likely to be recommended.

NNEPA Question/Comment No. 6 (Basis for Capital Cost Estimates):

PowerPoint Slide 11: Capital Costs Non-Tronox Share Are the "Capital Costs Non-Tronox Share" amounts identified those that will be sought through negotiations with other viable PRPs? Are these estimates based on the same options identified on slide I0?

USEPA Response No. 6 (Basis for Capital Cost Estimates):

The "Capital Costs Non-Tronox Share" shown on slide 11 of the October 13, 2021 PowerPoint are the estimated costs that non-Tronox PRPs for that site or group of sites would spend to fully address the sites, in addition to the Tronox funds that would be allocated to those sites. The

estimates are based on the same options presented in Slide 10. USEPA notes that the costs of final response actions may differ from those presently anticipated. While USEPA seeks to create estimates that are as accurate as possible based on existing information, USEPA acknowledges that despite best-efforts to anticipate costs, it is not unusual for actual costs to be as much as 50% greater or 30% less than anticipated. In addition, to the extent that a final response action may differ from the one used for the current estimate, the estimates may be even less accurate. In summary, final costs may be significantly higher or lower than current estimates, which are USEPA's best estimates based on currently available information.

NNEPA Question/Comment No. 7 (PRP Cost Shares):

With respect to the other viable PRPs, are there certain entities contemplated to account for more of the non-Tronox cost estimates? That is, will the amounts sought to bridge the Tronox Settlement funding gaps be pursued equally? Or will it be site/location specific? The Nation would like to reserve its right to comment on future estimates and values when the viable PRPs have not only been identified, but their contributions have been secured.

USEPA Response No. 7 (PRP Cost Shares):

USEPA does not anticipate allocating the non-Tronox costs among PRPs for a particular site or group of sites. Instead, USEPA plans to begin by engaging all PRPs for each site or group of sites and allowing the PRPs to resolve questions of relative responsibility among themselves. In many cases, USEPA will enter into a settlement with financially viable private parties, who in turn reserve their ability to seek contribution from other PRPs, including federal agency PRPs. At this time, we have begun the enforcement process by sending both private and federal PRPs General Notice Letters. USEPA will continue to coordinate closely with Navajo Nation and New Mexico during the enforcement process and, as in prior orders and settlements, will require PRPs to provide deliverables simultaneously to the appropriate tribal and state agencies to help ensure their substantial involvement in the cleanup process.

NNEPA Question/Comment No. 8 (Ability to Require Remaining PRPs to Complete Cleanup at All Tronox NAUM Sites):

The Navajo Nation is also concerned that the lack of consideration for all remedy options may not accurately capture the identified deficiency of the Tronox Settlement Funds.

Further, the Nation is concerned that proceeding with an allocation strategy before a remedy is selected again places the Nation in a position to not have its sites successfully remediated, perpetuating the devastating legacy of uranium mining across the Navajo Nation and leaving the Nation to be second to the State of New Mexico.

USEPA Response No. 8 (Ability to Require Remaining PRPs to Complete Cleanup at All Tronox NAUM Sites):

USEPA agrees that the current \$1.922 billion estimate of total costs to address the Tronox NAUM Sites may be too high or too low. However, we do not expect this to create a problem with securing full funding and complete cleanups for all of the Tronox NAUM Sites. Except in limited circumstances that USEPA does not believe apply here, PRPs with liability under CERCLA are jointly and severally responsible for response costs. To the extent that the shortfall in Tronox funding is greater than anticipated, the remaining financially viable PRPs will be responsible for providing 100 percent of that additional funding.

The draft Tronox Funding Allocation Strategy would provide a fixed percentage of anticipated capital costs for each site or group of sites. As PRPs work toward complete cleanup, they would receive that fixed percentage of each dollar the PRP demonstrates was spent on response work at or in connection with the site (39% is the estimated percentage of reimbursement in the October 13, 2021 PowerPoint), up to the total amount of Tronox Funding allocated for that site. After the allocated Tronox funding for the site is exhausted, the PRPs would be responsible for 100% of all additional costs needed to complete the cleanup and any required future maintenance of the response action.

The draft Tronox Funding Allocation Strategy would not put Navajo Nation second to New Mexico. In both Region 9 and Region 6, the same percentage of funding would be available to PRPs up to the allocated amount for each site or group of sites (as shown in Slide 11). In both Regions, PRPs would be responsible to perform a complete response for all of the sites at which they have CERCLA liability.

NNEPA Question/Comment No. 9 (Sources of Funding if PRPs are not Viable or Cooperative):

Finally, in the event that the other viable PRPs are not in fact viable or significant hurdles are faced in securing funds to cover the Non-Tronox PRP share, what funding sources are available to ensure the successful remediation all of the sites on the Navajo Nation?

USEPA Response No. 9(Sources of Funding if PRPs are not Viable or Cooperative):

Even in the event of additional private party bankruptcies, USEPA expects that the United States will remain able to fully fund final cleanups based on the liability of the federal PRPs.